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QUESTION PRESENTED

Does a heightened deliberate indifference standard apply to inmate housing assignment decisions and other actions that prison officials take to preserve institutional security.

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TABLE OF AUTHORITIES

In the

Supreme Court of the United States

October Term, 1993

No. 92-7247

DEE FARMER,

Petitioner,

v.

EDWARD BRENNAN, WARDEN, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE STATES OF MARYLAND, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, DELAWARE, GEORGIA, HAWAII, INDIANA, KANSAS, KENTUCKY, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WISCONSIN AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of respondents.

INTEREST OF *AMICI CURIAE*

This case involves important questions concerning the ability of federal and state prison administrators to operate correctional facilities consistent with the Eighth Amendment. The resolution of these questions requires defining the Eighth Amendment standard that controls

inmate housing decisions and is of major significance to the states because that standard implicates the core of the states' ability to administer their prison systems. All states, as does the federal government, regulate the housing assignment of inmates within their prison systems to minimize the safety risks that inmate classification decisions pose to inmates, correctional officers, administrators and visitors. Maryland, for example, considers an inmate's history of violence, criminal background, and offense severity, and other factors in determining the type of correctional facility (minimum, medium or maximum security) in which to place that individual, *see* Maryland Division of Corrections Regulation No. 100-1, VI.B.3 (1991), and examines an assortment of other criteria through a mandatory investigation process in deciding whether that inmate, or any inmate who is presently assigned to a particular institution, needs to be housed in administrative detention or protective custody either for the protection of the inmate or other inmates. *See* Division of Corrections Directives 100-131; 100-141; 100-142; 100-147; 100-148.

The Eighth Amendment does not create a constitutional cause of action enabling prisoners to seek judicial review of whether prison officials made the right housing assignment decision in implementing these types of security regulations. Inmate housing decisions in Maryland and other states are difficult and complex, and depend ultimately on the collective judgment of experienced administrators concerning the best assignment for each inmate. It is constitutionally unwarranted and practically unrealistic to superimpose upon the exercise of that discretion the constitutional *per se* rule that the petitioner demands: that certain inmates, because of sexual orientation or specific circumstances that the courts are somehow to identify, should not be assigned to the

general population of a prison and instead should be placed in "safer" housing. Such a rule advances no Eighth Amendment interests and needlessly infringes upon the uniquely subjective assessments concerning safety risks and other factors that influence all prisoner housing decisions. Conversely, requiring administrators to sequester certain groups of inmates to protect them from their fellow inmates and the dangers found in all prisons will compel prison officials throughout the country either to find special housing for large categories of prisoners in the already severely overcrowded state and federal prison systems, or to face strict liability for failing to do so. The Eighth Amendment does not compel such harsh choices.

STATEMENT

The petitioner describes himself as "a pre-operative transsexual" (Pet. at 2-3), who "is a genetic or biologic[al] male. . . ." (J.A. 43 ¶ 1.)[1] In 1986, the petitioner was convicted in the United States District Court for the District of Maryland of conspiracy to commit credit card access device fraud in violation of 18 U.S.C. § 1029, and was sentenced to imprisonment for a term of twenty (20) years. (Pet. at 2; J.A. 53 ¶ 36.) From the time he was first incarcerated through the time of the incident giving rise to his claims in this case, the petitioner was assigned to a total of six (6) federal prisons; throughout his incarceration, the petitioner admits that he operated a credit card fraud scheme. (J.A. 57 ¶ 52.) The petitioner

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[1] The record in this case is limited because the petitioner's claims were dismissed by the district court's decision granting the respondents' summary judgment motion following a period in which brief discovery took place. Many of the references in this statement are, therefore, to either the petitioner's Amended Complaint (J.A. 43) or a declaration the petitioner filed in opposition to the summary judgment motion. (J.A. 107.)

has been transferred on two separate occasions because of multiple disciplinary violations he had committed in connection with credit card fraud and other unlawful conduct he engaged in while incarcerated.

After brief assignments to the United States Medical Center for Federal Prisoners at Springfield, Missouri, where he acknowledges he received a disciplinary report for "credit-card misuse" (J.A. 112 ¶ 16; J.A. 58 ¶ 53), and to the Federal Correctional Institution at Elreno, Oklahoma, the petitioner was assigned to the United States Penitentiary at Lewisburg, Pennsylvania. (J.A. 56 ¶¶ 46-48.) The petitioner was assigned to administrative detention by officials at Lewisburg who determined that he would not be safe in the prison's general population.[2] The petitioner admits that while at Lewisburg he received two disciplinary reports related to illegal credit card use. (J.A. 57 ¶ 53.) He was subsequently transferred to the Federal Correctional Institution at Petersburg, Virginia, where he was placed in the general prisoner population except for time spent in administrative detention due to disciplinary infractions he committed there. (J.A. 58-59 ¶ 58.)

In his Amended Complaint, the petitioner alleges that he was sexually assaulted while in the general prisoner population at Petersburg, but admits that he failed to bring those alleged assaults to the attention of prison officials. (J.A. 59 ¶ 60.) The Amended Complaint also

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[2] In response to those efforts to protect him, the petitioner promptly sued, claiming, *inter alia*, that his confinement in administrative segregation violated his right not to be subjected to cruel and unusual punishment under the Eighth Amendment and his right not to be discriminated against under the Fourteenth Amendment. *See Farmer v. Carlson*, 685 F.Supp. 1335 (M.D.Pa. 1988).

alleges that at Petersburg the petitioner received a number of incident reports related to credit card fraud and other proscribed behavior. (J.A. 59 ¶¶ 61-62.) As a result of these infractions, the petitioner, who prison officials classified "as a Security Classification Level 5 inmate under Bureau of Prisons policy" (J.A. 11 ¶ 4), was transferred to the Federal Correctional Institution at Oxford, Wisconsin, which is a Level 4 institution. (J.A. 60 ¶ 64; J.A. 26.) The petitioner was placed in the general prisoner population at this federal prison. (J.A. 61 ¶ 71.)

Although the petitioner claims that he was sexually pressured by other inmates at Oxford, he has made no allegation that he communicated this information to Oxford prison officials. (J.A. 61 ¶ 71; J.A. 111 ¶ 14.) The petitioner's pattern of credit card-related and other disciplinary violations continued unabated at Oxford. (J.A. 62-63 ¶¶ 80, 81, 85; J.A. 112 ¶ 19.) Among other violations, the petitioner engaged in a sex act with another inmate knowing that the petitioner had tested positive for the human immunodeficiency virus (HIV) and that this behavior posed a significant risk to other inmates. (J.A. 10-11 ¶ 3; J.A. 113 ¶ 19.) As a result of his continuing credit card fraud violations, Oxford officials filed a request for a disciplinary transfer and recommended that the petitioner be sent to the United States Penitentiary at Leavenworth, Kansas, which is a Level 5 maximum security institution. (J.A. 32-33; 63 ¶ 82.) Instead, he was transferred to the United States Penitentiary at Terre Haute, Indiana, a Level 4 institution (J.A. 17 ¶ 9; J.A. 34), which the petitioner acknowledged in a declaration he filed in the district court "offered greater security than any other level 4 institution." (J.A. 115 ¶ 23. *See also* J.A. 11 ¶ 4 (prison official declaration asserting that petitioner was transferred to Terre Haute "for the purpose of placing

him in a different environment consistent with his individual security needs.").)

The Amended Complaint alleges that the petitioner was received at Terre Haute on March 9, 1989 and placed in administrative segregation until March 23, 1989, when he was released into the general population and assigned to Unit 3M. (J.A. 64 ¶ 88.) His assignment in this unit occurred after he was individually evaluated for assignment within this federal prison facility. (J.A. 94 ¶ 5; 28 C.F.R. § 522.21.) On April 1, 1989, the petitioner was allegedly attacked in his cell by another inmate. (J.A. 64 ¶ 24.) The petitioner subsequently filed suit in the United States District Court for the Western District of Wisconsin, claiming that various prison officials violated his Eighth Amendment rights in transferring him to Terre Haute and placing him in the general prisoner population there. (J.A. 43-44 ¶ 1.) Finding that "[n]one of the defendants had actual knowledge there was a threat to plaintiff's safety at USP-Terre Haute" and that "Plaintiff never expressed any concern for his safety to any of the defendants" (J.A. 123, 124), the district court held that the officials did not act with deliberate indifference to the petitioner in violation of the Eighth Amendment. (J.A. 124.) The Seventh Circuit summarily affirmed the district court's decision. (J.A. 127.)

SUMMARY OF ARGUMENT

The resolution of the petitioner's claims has sweeping ramifications for officials in federal and state prisons throughout the country because those claims directly call into question the ability of prison administrators to make housing assignment decisions for all inmates. Stripped of its rhetoric, the petitioner's argument is that prison officials have a mandatory

obligation under the Eighth Amendment, solely because of a prisoner's status as a pre-operative transsexual, either to house that prisoner separately from a penal institution's general inmate population or to confine him in a hypothetically "safe" institution. In protecting prisoners against the infliction of "cruel and unusual punishments", however, the Eighth Amendment proscribes only the "unnecessary and wanton" infliction of pain, and exposes officials to liability only when they act with "deliberate indifference" with respect to an inmate's safety. No *per se* violation of the Eighth Amendment results from the failure to place a prisoner in administrative detention or otherwise isolate that individual from other inmates.

The mere assignment of an inmate to a prison's general population is insufficient proof by itself to establish that officials intended to subject that inmate to "punishment" within the meaning of the Constitution, regardless of whether the inmate is a pre-operative transsexual, a homosexual, a child abuser, or otherwise characterized. Inmate housing decisions involve complex and sensitive issues, occur with great regularity, and are instrumental in the daunting task of ensuring the safety of inmates and correctional officers, which is perhaps the most important and difficult of the many responsibilities administrators assume in their effort to maintain prison security and order. The Eighth Amendment requires the application of a heightened deliberate indifference standard in the context of inmate assignment decisions that appropriately balances these strong institutional interests against the constitutional rights of prisoners. Such a standard should impose liability only when the risk of injury is so obvious and likely to result in harm that the officials' actions lack any good faith basis and give rise to an intent to injure.

Prison officials should not be found to be deliberately indifferent to the safety of an inmate who is assaulted in the general prisoner population when, as here, officials specifically have considered that inmate's situation and legitimately have exercised their judgment that administrative detention for that inmate was no longer warranted. The violent nature of the prison environment demands that administrators be accorded substantial deference in matters of institutional security and safety. That deference extends to the enforcement of rules and regulations that all penal officials, including those named as respondents here, routinely follow to maximize prison security and minimize the threat that individual inmates face in institutions throughout the federal and state prison systems. The process of weighing whether a particular inmate is so much more at risk than are other members of the prison population that administrative segregation is warranted is fraught with subjective evaluations, intuitions and predictions that courts are ill-equipped to second guess on a retrospective basis. The decision below should be affirmed because the respondents appropriately executed their discretion in addressing the myriad problems of prison population and administration, and properly discharged their responsibility to take reasonable steps to safeguard an inmate committed to their custody.

This Court should reject the petitioner's invitation to create a *per se* rule of liability based solely on his status as a pre-operative transsexual because the judiciary should not be in the business of telling prison officials what risks are so obvious as to impose automatically Eighth Amendment liability. All inmates are at risk of being attacked by other prisoners because all prisoners have been convicted of having violated the law and many of these individuals are dangerous. An Eighth Amendment rule that extends a heightened duty of care to

certain classifications of prisoners has no boundaries because there are a diversity of human characteristics that, depending on the particular prison setting, will always under such an unbridled rule command a greater need for protection for virtually any class of individuals. Simply put, no prisoner is "ordinary" and it trivializes the Constitution to expand the protective scope of the Eighth Amendment solely on the basis of a prisoner's sexual orientation or other attributes. This Court should read the Cruel and Unusual Punishments Clause to mean what it says and affirm the decision below.

ARGUMENT

A HEIGHTENED DELIBERATE INDIFFERENCE STANDARD SHOULD APPLY TO CLAIMS CHALLENGING THE ADEQUACY OF ACTIONS THAT PRISON OFFICIALS TAKE TO PRESERVE INSTITUTIONAL SECURITY

A. The Eighth Amendment in the context of inmate housing assignment decisions requires a heightened deliberate indifference standard to balance adequately the interests of prison officials in maintaining prison security and the competing rights of prisoners.

An analysis of the question that this case presents should begin with the language of the constitutional provision that the petitioner claims was violated here. "The Eighth Amendment, in only three words, imposes

the constitutional limitation upon punishments: they cannot be 'cruel and unusual.'" *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981). While this Court's earlier decisions interpreted this Amendment to proscribe physically barbarous punishments, *see, e.g., Wilkerson v. Utah*, 99 U.S. 130, 136 (1879); *In re Kemmler*, 136 U.S. 436, 447 (1890), this Court has since announced a more expansive view and "held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society,' or which 'involve the unnecessary and wanton infliction of pain.'" *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976), quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). The present constitutional inquiry is two-fold: "[C]ourts considering a prisoner's [Eighth Amendment] claim must ask both if 'the officials acted with a sufficiently culpable state of mind' and if the alleged wrongdoing was objectively 'harmful enough' to establish a constitutional violation." *Hudson v. McMillian*, 112 S.Ct. 995, 999 (1992), quoting *Wilson v. Seiter*, 111 S.Ct. 2321, 2326, 2329 (1991).

This constitutional protection does not sweep broadly, however, as "[n]ot every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny. . . ." *Whitley v. Albers*, 475 U.S. 312, 319 (1986). To the contrary, "the protection afforded by the Eighth Amendment is limited." *Ingraham v. Wright*, 430 U.S. 651, 669-70 (1977). For example, "in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'" *Estelle v. Gamble*, 429 U.S. at 105-06. In all situations, "[t]o be cruel and unusual punishment, conduct that does not

purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety." *Whitley v. Albers*, 475 U.S. at 319. Rather, "[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." *Id.*

The Eighth Amendment requirement of "obduracy and wantonness" varies according to the specific state concerns and prisoner interests that are at stake in each situation and must take into account the "differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Whitley*, 475 U.S. at 320. In *Whitley*, which involved a prisoner who was shot in the leg by correctional officers attempting to quell a prison riot, this Court found that a strict standard was warranted, recognizing that "in making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, prison officials undoubtedly must take into account the very real threats the unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used." *Id.* at 320. Thus, an assessment of whether wantonness existed in that setting required considering "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." 475 U.S. at 320-21, quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir.) (Friendly, J.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973).

In contrast, the Court in *Whitley* noted, it was appropriate in *Estelle* to measure prison officials'

wantonness against the "deliberate indifference" standard "because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities." 475 U.S. at 320. Subsequently, in *Wilson v. Seiter*, the Court extended that rationale beyond the provision of medical care in deciding that other acts taken by prison officials are also to be evaluated under the deliberate indifference standard. Observing that "the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates," 111 S.Ct. at 2326-27, this Court stated "[t]here is no indication that, as a general matter, the actions of prison officials with respect to these nonmedical conditions are taken under materially different constraints than their actions with respect to medical conditions." 111 S.Ct. at 2327. Thus, in cases challenging the conduct of officials in these contexts, "'it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle*.'" *Id.*, quoting *LaFaut v. Smith*, 834 F.2d 389, 391-92 (4th Cir. 1987) (Powell, J.).

This passage, and a string citation of cases immediately following it that contains two prisoner assault cases, *see* 111 S.Ct. at 2327, citing *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir.), *cert. denied*, 488 U.S. 823 (1988); *Morgan v. District of Columbia*, 263 U.S.App.D.C. 69, 824 F.2d 1049 (1987), make clear that the deliberate indifference standard applies in this case. But because "wantonness does not have a fixed meaning," *Wilson*, 111 S.Ct. at 2326, an assessment of the "wantonness" of the prison officials' actions in this case must take into account the situation in which the petitioner's claim arises -- just as in *Whitley* and *Hudson*

v. McMillian, 112 S.Ct. at 999, this Court found the situations there warranted a "sadistic and malicious" standard. The different types of conduct that this Court in *Wilson* found should be scrutinized under the deliberate indifference standard do not merit exactly the same Eighth Amendment analysis because they do not each present the same balance of state concerns against prisoner interests. Rather, because the Eighth Amendment applies to a vast continuum of behavior with respect to which the riot situation in *Whitley* and the medical care in *Estelle* mark two defined points, the constitutional standard to be applied must be tailored to the specific conduct at issue.

This case falls closer to *Whitley*: while it does not involve the riot situation that this Court has held should be evaluated under the strict sadistic and malicious standard, the petitioner's claim that he either should not have been transferred to the United States Penitentiary at Terre Haute, or should have been protected from the general prisoner population there, nonetheless involves closely related safety issues that trigger many of the same "important governmental responsibilities" that this Court in *Whitley* found "a deliberate indifference standard does not adequately capture. . . ." 475 U.S. at 320. Specifically, the inmate housing assignment decision challenged in this action implicates vital safety concerns, thus strongly illustrating that this is not a case in which "'deliberate indifference to a prisoner's serious illness or injury' can . . . be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates." *Whitley*, 475 U.S. at 320, quoting *Estelle*, 429 U.S. at 105.

Policies and practices oriented toward the protection of prisoners lay at the heart of a prison's operations, as "[t]he safety of the institution's guards and

inmates is perhaps the most fundamental responsibility of the prison administration." *Hewitt v. Helms*, 459 U.S. 460, 473 (1983). The specific assignment of inmates within a prison is critical to the ability of administrators to fulfill this essential obligation to protect prisoners and staff and to meet "the central objective of prison administration, safeguarding institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). These are "difficult and sensitive matters of institutional administration and security," *Block v. Rutherford*, 468 U.S. 576, 588 (1984), and they are placed directly at issue by the petitioner's challenge to his assignment in the general prisoner population of Terre Haute. A deliberate indifference standard higher than that which this Court applied in *Estelle* and *Wilson* is warranted in this case to balance adequately these interests of prison officials in ensuring prison safety and security against the Eighth Amendment rights of inmates.

B. Prison officials cannot be held liable for failing to protect a prisoner from being assaulted by another inmate unless the risk of harm is so obvious and likely to result in the assault that the failure to act gives rise to an intent to harm.

In cases such as this in which prison officials deliberate over the inmate assignment decision that forms the basis of the prisoner's claim, "the realities of prison administration," *Helling v. McKinney*, 113 S.Ct. 2475, 2482 (1993), weigh heavily in assessing whether the acts or omissions of those officials constitute wanton behavior that the Eighth Amendment proscribes. Those realities require a standard that imposes liability on prison officials

in cases involving prison security only when they act with "such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Whitley*, 475 U.S. at 321.

Whitley foreshadowed the extension of this standard to prison security cases in the non-riot context by immediately following its pronouncement of this standard with an explanatory citation to *Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986), which *Whitley* described as "equating 'deliberate indifference,' in an Eighth Amendment case involving security risks, with . . . '[. . .] an act so dangerous that the defendant's knowledge of the risk can be inferred'". 475 U.S. at 321, quoting *Franzen*, 780 F.2d at 652.[3] In later concluding in *Wilson* that the Eighth Amendment's use of the word "punishment" means that "some mental element must be attributed to the inflicting officer before it [pain] can qualify [as punishment]," 111 S.Ct. at 2325, this Court again tacitly approved of this heightened deliberate indifference standard in the security context by quoting the following passage from that same page of the *Franzen* decision:

> The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century. . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be

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[3] In *Franzen*, 21 prison inmates who were placed on a bus and handcuffed and chained together for security reasons claimed their Eighth Amendment rights were violated because prison officials failed to implement effective precautions with respect to the consequences of a fire that subsequently occurred on the bus.

> punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.

Wilson, 111 S.Ct. at 2325 (brackets supplied by this Court).

The standard that should apply in the context of a prisoner assault case, therefore, is one that imposes liability only when the risk of injury is so plain and the ensuing harm so apt to occur that the actions of responsible prison officials taken in such circumstances can be found to be sufficiently lacking in good faith such that an intent to harm can be reasonably inferred. *See, e.g., McGill v. Duckworth*, 944 F.2d 344, 351 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992) ("Suspecting that something is true but shutting your eyes for fear of what you will learn satisfies scienter requirements. Going out of your way to avoid acquiring unwelcome knowledge is a species of intent."). Conversely, prison officials should not be held liable for injuries that an inmate sustains in an attack by another prisoner in the prison's general population when those officials legitimately have exercised their discretion that the injured inmate should be assigned there.

Deliberate indifference in the context of municipal liability means that a city may be found liable for injuries caused by inadequacies in a police training program when "the need for more or different training is so obvious, and the inadequacy [is] so likely to result in the violation of constitutional rights. . . ." *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). The setting of a prisoner assault case demands an even greater deliberate indifference showing than that required in *City of Canton* because of the need to safeguard the institutional concerns that prison

administrators face. "Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel," *Bell v. Wolfish*, 441 U.S. at 547, and so it is essential that administrators be accorded significant leeway in decisions concerning inmate assignment and prison security.

This discretion is warranted by the very nature of prisons which, "by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for anti-social criminal, and often violent, conduct." *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). The instability and unpredictability of that environment necessarily means that the administrators' exercise of their obligation to protect the safety of inmates is charged with intuition and speculation concerning what safety measures are warranted:

> In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like. *In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents.* The judgment of prison officials in this context, like that of those making parole decisions, turns largely

> on "purely subjective evaluations and on predictions of future behavior," *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981); indeed, the administrators must predict not just one inmate's future actions, as in parole, but those of an entire institution.

Hewitt v. Helms, 459 U.S. at 474 (emphasis added).

The volatile nature of the prison setting demonstrates why "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." *Rhodes v. Chapman*, 452 U.S. at 349, n.14. This Court has recognized that the deference accorded prison officials in security matters "extends to a prison security measure taken in response to an actual confrontation with riotous inmates" *and "to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline*." *Whitley*, 475 U.S. at 322 (emphasis added). That deference requires a heightened showing of deliberate indifference to make out an Eighth Amendment violation with regard to such anticipatory safety measures, including the inmate assignment decision at issue here. Of course, this "does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice." *Id.* Officials should not escape liability by choosing either to ignore risks of which they are aware or to do nothing in the face of risks that are very obvious and apparent. Nor should they be able to avoid their obligations under the Eighth Amendment by engaging in a bad faith review of an inmate's safety needs.

There is no evidence in this case, however, of any such conduct. To the contrary, the warden of the United States Penitentiary at Terre Haute stated in an unrefuted sworn declaration filed in the district court that prison officials there complied with federal prison regulations "to professionally evaluate inmate Farmer's particular needs and situation and determine the most appropriate specific placement upon his designation to USP-Terre Haute." (J.A. 94 ¶ 5.) The conscious decision to remove the petitioner from administrative segregation and place him in the general prisoner population based on such an individualized evaluation means that this case "is quite different from one involving injuries caused by an unjustified attack by prison guards themselves, or by another prisoner where prison officials simply stood by and permitted the attack to proceed." *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (citations omitted). Such an assignment decision "does not amount to cruel and unusual punishment simply because it may appear in retrospect . . . unreasonable, and hence unnecessary in the strict sense." *Whitley*, 475 U.S. at 319.

Because prison officials in *every* case must consider where within a prison an inmate should be assigned, it *should* be "very difficult to demonstrate that prison authorities are ignoring the possible dangers posed by exposure" of an inmate to the general population. *Helling v. McKinney*, 113 S.Ct. at 2482. This case accentuates the need for applying a heightened deliberate indifference standard to inmate assignment decisions because it underscores the difficulty that officials routinely face when seeking to evaluate an inmate's need for special protection. Notwithstanding the petitioner's individualized placement evaluation at Terre Haute, the petitioner asked none of the officials responsible for that evaluation to place him in administrative segregation. In fact, the

district court below found that the petitioner never communicated any concerns for his safety to either the warden or any of the other respondents. (J.A. 123-24.) Moreover, the petitioner in his Amended Complaint acknowledged that he failed to report to prison officials sexual assaults he claims he experienced while in the general population of FCI-Petersburg (J.A. 59 ¶ 60), and, similarly, has made no allegation that he brought to the attention of any prison officials the sexual pressure he now maintains he was subjected to while in the general population of FCI-Oxford, where he was housed immediately prior to being transferred to Terre Haute. (J.A. 61 ¶ 71.)

These facts are obviously relevant to the question of whether the respondents acted with deliberate indifference; however, neither they nor any other single factor can be dispositive of whether these prison officials had a mandatory constitutional obligation to transfer the petitioner elsewhere or assign him to administrative segregation, as the assignment decision at issue here is inherently subjective in nature. Applicable Department of Justice regulations that govern the assignment of all inmates within the federal prison system evidence the highly subjective quality of this assignment process and that the decision to protect any prisoner is laden with individual judgment.[4] The exercise of this judgment,

[4] Federal prison regulations provide that all "Bureau of Prisons staff screen newly arrived inmates to ensure that Bureau health, safety, and security standards are met." 28 C.F.R. § 522.20. With the exception of prison camps and other such facilities "where segregating a newly arrived inmate in detention is not feasible," the regulations provide that the warden of each institutional facility "shall ensure that a newly arrived inmate is cleared by the Medical Department and provided a social interview by staff before assignment to the general population." *Id.*, § 522.21(a). Regulations also provide that "[i]mmediately upon an inmate's arrival, staff shall interview the inmate to determine if there are non-medical reasons for housing the inmate away from the general population. Staff shall evaluate both the general physical appearance and emotional condition of the inmate." *Id.*, § 522.21(a)(1). The regulations attempt to provide some guidance in the exercise of these decisions and provide in relevant part that "[s]taff may consider the following categories of inmates as protection cases: (1) Victims of inmate assaults; . . . (3) Inmates who have received inmate pressure to participate in sexual activity; . . . (6) Inmates who refuse to enter the general population because of alleged pressures from other unidentified inmates; (7) Inmates who will not provide, and as to whom staff cannot determine, the reason for refusal to return to the general population; and (8) Inmates about whom staff has good reason to believe the inmate is in serious danger of bodily harm." *Id.*, § 541.23(a).

moreover, often provokes opposition from the inmate himself.[5] The prisoner in this case, for example, sued officials at the United States Penitentiary at Lewisburg when he was segregated from the general population at that facility for safety reasons, and claimed the opposite of what he contends here -- he alleged that the actions that prison officials took to protect him because of his status as a pre-operative transsexual constituted cruel and unusual punishment in violation of his rights under the Eighth Amendment. *See Farmer v. Carlson*, 685 F.Supp. 1335 (M.D. Pa. 1988). He also asserted that his assignment in administrative segregation discriminated against him on the basis of his sex. *Id.*

The petitioner's litigation history is representative of the tensions that prison officials face when they undertake "reasonable measures to guarantee the safety of . . . inmates. . . ." *Hudson v. Palmer*, 468 U.S. at 526-27. Because these subjective judgments are always implicated

[5] Inmates routinely challenge decisions affecting their transfer for security reasons. *See, e.g., Olim v. Wakinekona*, 461 U.S. 238 (1983); *Meachum v. Fano*, 427 U.S. 215 (1976).

when prison officials act to maintain prisoner safety and security, substantial deference should be accorded the manner in which those measures are implemented to "convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Whitley*, 475 U.S. at 320. Requiring anything less than a heightened showing of deliberate indifference in inmate assignment cases is inconsistent with that deference and would advance neither institutional nor Eighth Amendment concerns.

C. Transferring a prisoner to a penitentiary for which he was eligible and assigning him to the general population there do not constitute deliberate indifference solely because that prisoner is a pre-operative transsexual.

Applying a heightened deliberate indifference standard to the petitioner's claim that he was assigned improperly to the general prison population represents an appropriate balance between the interests underlying the Eighth Amendment against the infliction of cruel and unusual punishments, and the countervailing interest in allowing prison officials to attend to internal security and other features of prison administration unhindered in their judgments by concerns for legal liability. *Cf. Hewitt v. Helms*, 459 U.S. at 474, n.7. But applying a standard that in effect holds the prison officials in this case liable under the Eighth Amendment solely because of the petitioner's status as a pre-operative transsexual will further none of the important interests discussed above, and will instead "effectively collapse[] the distinction between mere

negligence and wanton conduct," *Whitley*, 475 U.S. at 322, because it will eviscerate "the difference between one end of the spectrum -- negligence -- and the other -- intent. . . ." *Daniels v. Williams*, 474 U.S. 327, 335 (1986). The protection against cruel and unusual punishments does not encompass such a minimalist standard of constitutional liability.

The deliberate indifference standard that the petitioner asks this Court to apply in this case is even lower than the standard the Court has applied in other contexts that do not involve the state concerns at issue here, and would allow courts to second guess by rote prison administrators in their daily management functions without promoting any Eighth Amendment interests. Even under the deliberate indifference standard that this Court applied in *City of Canton v. Harris*, 489 U.S. at 390, officials would not be subject to Eighth Amendment liability when they legitimately exercise their discretion and assign to a prison's general population an inmate who is assaulted by another prisoner, as such an assignment decision does not constitute deliberate indifference merely because it may be the result of faulty judgment. *See Whitley*, 475 U.S. at 319. Yet a very different result would be reached under the petitioner's standard, which cuts off any inquiry concerning the legitimacy of that assignment decision and would impose liability simply upon a finding that the risks engendered in such a decision were "obvious" or "overwhelming." (Pet. Br. at 12.) Courts under this approach would regularly instruct prison officials what risks are obvious and routinely would place themselves in the business of micromanaging the judgment of administrators in maintaining institutional security and order.

There is no support for such an unorthodox and

relaxed reading of the Constitution that would allow prison administrators to be held responsible for failing to estimate properly the risk of assigning inmates to the general prison population. Prison "[o]fficials cannot realistically be expected to consider every contingency or minimize every risk," *Whitley*, 475 U.S. at 325, because there exists in virtually all prisons an "ever-present potential for violent confrontation and conflagration," *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977), due to the individuals incarcerated there:

> Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.

Hudson v. Palmer, 468 U.S. at 526.

Recently compiled statistics of the Bureau of Justice show that from July 1, 1989 through June 30, 1990, prison officials reported 21,184 incidents in which inmates in state confinement assaulted other inmates, resulting in an average of 34.9 assaults per 1,000 inmates, and 406 incidents in which inmates in federal confinement attacked other prisoners, averaging 7.4 assaults per 1,000 inmates. *See* May 6, 1992 Bureau of Justice Statistics, U.S. Dept. of Justice, *Census of State and Federal Correctional Facilities, 1990*, at 5, Table 6. Statistics on violent crime in the state and federal prison systems referred to in *Hudson* and other cases, *see, e.g., Cortes-Quinones v. Jiminez-Nettleship*, 842 F.2d at 562; *Young v.*

Quinlan, 960 F.2d 351, 362-363 (3rd Cir. 1992), further illustrate the dangerous environment found in penal institutions throughout our Nation.

All prisoners are at risk, therefore, of being attacked by other inmates; indeed, the petitioner has acknowledged candidly "that numerous prisoners, who are not transsexual, request protection at USP-Terre Haute" (Pet. at 5), and conceded in a declaration he submitted in the district court that he "was sexually pressured by inmates even while in detention." (J.A. 118 ¶ 27.) In view of these undisputed facts of prison life, even if prison officials underestimated the risks that the petitioner faced in comparison to the risks confronting other inmates when they arranged for the petitioner's transfer to Terre Haute, and even if these officials determined incorrectly that he faced no greater risks than other inmates in being assigned to that prison's general population, that simply means that, at most, the petitioner may have a claim under the Federal Tort Claims Act. That does not mean, however, that these officials acted with deliberate indifference unless this Court transforms the Eighth Amendment into "a font of tort law to be superimposed" upon all prison systems. *Daniels v. Williams*, 474 U.S. at 332, quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976).

Such a radical transformation is constitutionally unwarranted and would create a practicably unworkable situation. Given that prisons by their very nature are dangerous and that many inmates live in fear of others, there is no principled basis for singling the petitioner out for special protection solely because of his transsexual status but not extending that level of protection to other inmates who, because of personal characteristics or circumstances unique to them, also claim to be at risk in the prison population. Due to the wide range of personal

attributes found among prisoners in the penal system and the non-existence of any "normal" or "regular" prisoner, there is no logical stopping point in an approach that requires courts to attach dispositive weight to any specific characteristic or situation as warranting heightened protection for the class of prisoners fitting that mold. A decision holding that the petitioner, simply because he is a pre-operative transsexual, should have been assigned to special detention logically also envelopes homosexuals, transvestites, pedophiles, and other individuals exhibiting an unconventional sexual orientation. The rule would not stop there, however.

Courts would also be obligated to embark on an endless probe of the particulars of each prison's population and environment to determine whether certain traits or conditions exist that demand special protection under the Eighth Amendment. A white male, for example, would probably be deemed to be no more at risk than any other member of the general prisoner population at the Central Utah Correctional Facility but, under the rule advanced by the petitioner, might be found to be such a minority at the Arecibo District Jail in Puerto Rico that a constitutional obligation exists to sequester that inmate from the rest of the population. It is easy to envision a number of other examples, such as whether the assignment of a child abuser to the general population of a prison constitutes an Eighth Amendment violation, that attest to the unworkability of such a rigid rule of constitutional law.

Cost considerations further demonstrate the inappropriateness in interpreting the Constitution in the broad manner that the petitioner urges. "[T]he problems of prison population and administration have been exacerbated by the increase of serious crime and the effect

of inflation on the resources of States and communities." *Rhodes v. Chapman*, 452 U.S. at 351, n. 16. A rule requiring special housing and other precautions for inmates solely because of certain of their traits and circumstances would have a potentially devastating effect on the states, especially those with few prisons and limited flexibility with respect to where to assign such inmates. Many states house all female prisoners within one institution. Some states similarly have a limited range of minimum, medium and maximum security prison facilities in which they can separate defendants convicted of non-violent crimes from the more dangerous criminal offenders. *See generally* American Correctional Association, DIRECTORY OF JUVENILE AND ADULT CORRECTIONAL DEPARTMENTS, INSTITUTIONS, AGENCIES & PAROLING AUTHORITIES (1993). Requiring extraordinary treatment for inmates on the basis of "special circumstances" presents these states with the Hobson's choice of either facing liability for not housing these inmates away from the rest of the prison population, or devoting scarce (or non-existent) financial resources to the construction of myriad separate facilities for these various types of inmates.

The petitioner's proposed rule is both practically unsound and constitutionally unnecessary. The relevant inquiry in determining whether prison officials have acted with deliberate indifference toward a prisoner who is assaulted by another inmate is one that focuses on all of the circumstances surrounding and leading up to that inmate's assault. That inquiry reveals that the officials in this case made a considered decision in transferring the petitioner to and assigning him to the general population at Terre Haute and did not act with the requisite wantonness that the Eighth Amendment proscribes. The petitioner's assignment to a higher security institution was

wholly warranted because, by his own account, he continued to engage in a number of acts since his initial incarceration that constituted infractions of prison rules and regulations and resulted in a number of disciplinary sanctions entered against him. (J.A. 57-63 ¶¶ 52-85; J.A. 112-113 ¶¶ 16-19.) He freely admits, for example, that he "operated a credit-card fraud organization while in the custody of state and federal authorities and though serving a twenty year federal sentence and a consecutive thirty year state sentence, this had not deterred her from continuing to engage in these activities." (J.A. 57 ¶ 52.) The most recent of these actions, as the district court found, resulted in disciplinary sanctions that included "a recommendation for a disciplinary transfer." (J.A. 123.)

The district court also found that prison officials believed that the petitioner's transfer to Terre Haute was appropriate "to handle the problems and needs presented by plaintiff." (*Id.*) The petitioner offered no evidence below refuting the determination of prison officials that he was eligible for assignment to Terre Haute based on his security classification level and that of the institution. (J.A. 17 ¶ 9.) Nor has he ever disputed that his assignment to the general population at Terre Haute occurred after officials there met with him for the purpose of determining the most appropriate assignment for him at that facility. *See* 28 C.F.R. § 522.21(a); J.A. 94 ¶ 5. Nor did he ask not to be assigned to the general prison population when he met with officials responsible for his placement at Terre Haute. This Court long ago recognized that no Eighth Amendment violation occurs where "[t]here is no purpose to inflict unnecessary pain. . . ." *Francis v. Resweber*, 329 U.S. 459, 464 (1947). There is no constitutional basis for inferring that such a purpose exists here solely because the respondents transferred a pre-operative transsexual prisoner to Terre

Haute and did not keep him in administrative detention.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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